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IN THE

Supreme Court of the United States

October Term [redacted] 1970

No. ... [redacted]

783

JOE PERKINS,

Petitioner,

vs.

THE STATE OF CALIFORNIA acting by and through the Superior Court in and for the County of Los Angeles,

Respondent.

MOTION FOR LEAVE TO FILE WRIT OF CERTIORARI.

and

PETITION FOR WRIT OF CERTIORARI.

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IN THE

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vs.

THE STATE OF CALIFORNIA acting by and through the Superior Court in and for the County of Los Angeles,

Respondent.

MOTION FOR LEAVE TO FILE WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

Petitioner hereby moves the above entitled Court for its Order granting leave to petition to file his writ of certiorari, as set forth in detail hereinafter.

Dated the 30 day of April, 1970.

LUKE MCKISSACK,
Attorney for Petitioner.

PETITION FOR WRIT OF CERTIORARI.

The petition of Joe Perkins respectfully sets forth:

I.

JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 125(f).

II.

On the 23rd day of March, 1970, an Order was made and signed by the Honorable W. O. Douglas, Associate Justice of the Supreme Court of the United States, extending the time in which to file the within petition to and including the 2nd day of May, 1970.

III.

The jurisdiction of this Court is invoked to settle an important question of law which has not been, but should be, settled and determined by this Honorable Court, as set forth immediately below.

IV.

QUESTIONS PRESENTED.

The questions of law presented by this petition are as follows:

A. Whether Sections 11530 and 11531 of the Health and Safety Code of the State of California imposing severe penalties for the possession and sale of marijuana are unconstitutional in that they constitute an unreasonable invasion of the right to freedom of expression in violation of the First Amendment to the United States Constitution.

B. Whether Sections 11530 and 11531 of the Health and Safety Code of the State of California are unconstitutional in that they violate the right of privacy and additional unnamed but fundamental rights guaranteed and emanating from the First, Third, Fourth, Fifth and Ninth Amendments to the United States Constitution.

C. Whether Sections 11530 and 11531 of the Health and Safety Code of the State of California are unconstitutional in that they violate the constitutional guarantees against cruel and unusual punishment found in the Eighth Amendment to the United States Constitution.

D. Whether the use of marijuana is one of the personal liberties guaranteed by the due process clause of the Fourteenth Amendment.

E. Whether Sections 11530 and 11531 of the Health and Safety Code of the State of California are unconstitutional in that California, in its exception to the peyote possession statute set forth in *People v. Woody*, 61 Cal. 2d 716, 394 P. 2d 813, 40 Cal. Rptr. 69 (1964) where use of peyote is a means of religious expression, while prohibiting the use of mild halucinatory drugs where they are used to further possibly intellectual though non-religious expression, is enforcing or initiating an invidious form of religious discrimination in violation of the constitutional prohibition against the establishment of religion.

F. Whether the classification of marijuana as a narcotic in Section 11001 of the California Health and Safety Code, in the prohibition against possession of marijuana in Section 11530 of the said Health

and Safety Code, while other euphorics such as alcohol, are excluded, violates the equal protection clause of the Fourteenth Amendment to the United States Constitution.

G. Whether petitioner's trial counsel was so lacking in diligence and competence that the trial was reduced to a farce or sham thus denying petitioner his constitutional right to the effective aid of counsel.

V.
CONSTITUTIONAL GROUNDS.

The constitutional provisions on which this petitioner seeks to ground this petition, namely, the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution, are set forth *in haec verba* in the attached Appendix B.

VI.
FACTS OF THE CASE.

Petitioner was convicted of four counts of violation of Section 11912 and Section 11531 of the Health and Safety Code of the State of California, based on the following facts:

A California State Narcotics Agent, agent Vaughn, testified that sometime prior to November 29, 1967, he met one Kathy Marks and engaged her services as a paid informant for the State Bureau of Narcotics. Other testimony in the case indicated that Marks had informed in other matters as well.

On November 29, 1967, Marks introduced petitioner to Vaughn as well as a James Simmons. Vaughn testified that on that date, following a discussion between the three, he purchased a quantity of amphetamines

from Simmons which were taken from petitioner's car. An information was filed against Simmons, but he is apparently still at large.

A discussion was had concerning the purchase of marijuana, and Vaughn testified that the following day, November 30, he purchased five kilos of marijuana from Simmons and petitioner.

Vaughn testified that on December 13, 1967, he made further purchase of marijuana from petitioner and Simmons, and again on January 7, 1968, on which date Simmons was not present. Marks was present at all of these transactions except that of November 30, 1967.

Following the sale on January 7, 1968, petitioner and three others, not parties to this petition, were arrested and subsequently charged with the above stated offense.

All of the foregoing testimony was offered at the preliminary hearing in Superior Court; at the time of the preliminary hearing, defense counsel for petitioner knew all of the facts which would have supported a complete and adequate defense, *i.e.*, entrapment, and did not cross-examine Vaughn or call petitioner, but, instead, merely submitted the matter on the basis of testimony adduced at the preliminary hearing, and did so after assuring the petitioner that if he were found guilty, petitioner would either be granted probation or a very short misdemeanor sentence.

Following a felony sentence, petitioner, then represented by present counsel, appealed the matter to the California Court of Appeals, which affirmed the action of the trial court, and petitioner then asked the

Supreme Court of California for a hearing, which hearing was denied.

Prior to the actual hearing of the appeal in the Court of Appeals, petitioner attempted to bring before that court that fact of an adequate defense, which attempt was denied, as appears in the Opinion, on the basis that only facts before the trial court could be considered on appeal.

The question of the constitutionality of the above-named sections of the California Health and Safety Code was first raised before the Court of Appeals of the State of California, on an appeal taken from the aforesaid conviction.

VII.

REASONS FOR GRANTING THE WRIT.

The Statutes at Issue Dealing With Marijuana Are Unreasonable and Inconsistent in Their Treatment of Possession, Use and Sale.

The penalties for possession of marijuana were recently somewhat relaxed in the case of a first offense, to provide an alternative by which a court may impose either a county jail sentence or a state prison sentence. (Sec. 11530, California Health and Safety Code.) In spite of this minor relaxation of the harsh penalty imposed for this offense this stands as a harsh penalty as compared to the milder penalties for use of marijuana or being under its influence, which are, by statutes, only misdemeanors. (Sec. 11721, California Health and Safety Code.)

As a further inconsistency, the severe punishment available for possession of marijuana should be compared with the misdemeanor penalty for possession of LSD, a drug commonly known to have far more dangerous propensities. (Sec. 11910 California Health and Safety Code.)

Marijuana is clearly being treated in the same category as the "hard" narcotics heroin, morphine or cocaine, which are addictive, since the punishment for their possession is quite similar. However, marijuana is not addictive, as discussed below.

The recent modification of Sec. 11530 California Health and Safety Code, bringing the statutory punishment back to the position which existed prior to 1961, tends to indicate recognition on the part of the Legislature that the severity of the punishment is all out of proportion to any threat to society that the drug might arguably present.

A commission of the United States Food and Drug Administration has publically stated that "the severity of the penalties is inconsistent with the nature of the drug itself" (San Francisco Chronicle, October 15, 1967, page 19, col. 3.)

The United States Presidential Commission on Law Enforcement and Administration of Justice has called for a reevaluation of the marijuana laws. (President's Commission on Law Enforcement and Administration of Justice, The Challenge of Change in a Free Society, 1967, 224-5.)

Sections 11530 and 11531 California Health and Safety Code Are Particularly Illogical When Contrasted With the Legal Position Taken Toward Use of Alcohol.

As a further contrast, it is noteworthy that there is no law against the possession of alcoholic beverages in spite of the well known dangers of this intoxicant. Criminal penalties are imposed only when alcohol is used in some abusive manner, such as when a person becomes intoxicated in public (Cal. Penal Code Sec. 647(f)) or operates a motor vehicle when so intoxicated (Cal. Vehicle Code Sections 23101-02.)

Section 11530, on the other hand, declares a crime exists even when there is no abuse or victim. Petitioner submits that it cannot be logically concluded that the sale of marijuana can be held to be an abuse where possession reflects no real abuse. (Note the 1915 decision in *People v. Luera*, 28 Cal. App. 185, 152 Pac. 738, which held that a municipal ordinance making the possession of alcohol illegal represented a constitutional abridgment of the privileges and immunities guaranteed a U.S. citizen by Article VI, Section 101 of the U.S. Constitution and the Fourteenth Amendment, Sec. 1).

Recently, there has been increasing debate across the nation over the harshness of the marijuana possession laws, as compared to the alleged effects of the "drug." See, generally, The Marijuana Papers (Solomon Ed., 1966); The Utopiates (Bloom Ed., 1964). And, as above, a Food and Drug commissioner, and a Presidential Commission, has called for a reevaluation of the marijuana laws.

Legal scholars and law schools have joined in the general public controversy on the entire subject of marijuana regulation. See, generally, *Boyko & Rotberg, "Constitutional Objections to California's Marijuana Possession State."* 14 UCLA Law Review, Al. Rev. 773 (1967); and *Towne, "The California Marijuana Possession Statute: an infringement on the right of privacy or other peripheral constitutional rights?"* 19 Hastings L. J. 758 (1968).

The Few Existing Studies of the Uses of Marijuana Indicate That Many of the Preconceptions Regarding the Physiological and Sociological Effects of Its Use Are Pure Myth.

The only real authoritative study on the subject in the United States is the Report of the Mayor's Committee on Marijuana, The Marijuana Problem in the City of New York (1944), more commonly known as the "LaGuardia Report." Significant excerpts from this report were reprinted in the Marijuana Papers, *supra*. According to this study, "Neither the ingestion of marijuana nor the smoking of marijuana cigarettes affects the basic outlook of the individual except in a very few instances and to a very slight degree. In other words, reactions which are natively alien to the individual cannot be induced by the ingestion or smoking of the drug." (LaGuardia Report, p. 131.)

Furthermore, it was revealed that the use of marijuana is not a stepping stone to the use of "hard" narcotics, nor is it a determining factor in the commission of major crimes. (*Id.*; p. 25.)

Statistics indicate that the majority of marijuana users arrested are first offenders. (Bureau of Crim-

inal Statistics, Drug Arrests and Dispositions in California, 1966, at 63.) This clearly does not support a charge that the use of marijuana leads to an increase in criminal acts; it simply reveals that the use of marijuana may lead to being arrested for the criminal offense of possession of marijuana.

Indeed, several subsequent studies have shown that there is a *negative* correlation between crime and the use of marijuana. (*Murphy: A Review of Recent Psychiatric Literature*, 15 U N Bull on Narcotics 3, 1963.)

In short, most authorities considering the question agree that there is nothing to support the assertion that the use of marijuana leads to aggressive or antisocial conduct culminating in a criminal activity. (*McGlothlin, "Cannabis: A Reference,"* in the Marijuana Papers, *supra*, 401, 402.)

It is also well established that marijuana is not addictive. This fact is recognized by California Welfare and Institutions Code, Sec. 3009, which specifically exempts marijuana from addictive narcotics.

This fact is also established when evaluated by the legal tests for addition laid down in the recent cases of *People v. O'Neil*, 62 Cal. 2d 748, 755, 401 P. 2d 928, 932, 44 Cal. Rptr. 320, 324 (1965), distinguishing habituation from addiction, and *People v. Victor*, 62 Cal. 2d 280, 302-04, 398 P. 2d 391, 405-406, 42 Cal. Rptr. 199, 213-214 (1965).

Both cases hold that to be an addict one must be physically and emotionally dependent upon a narcotic, as well as having developed a tolerance for it; this result does not occur from the use of marijuana. Thus is follows, petitioner submits, that a marijuana user

will not be driven to illegal means to acquire it. An even more widely perpetuated myth is the one which holds that the use of marijuana acts as a stepping stone to the use of addictive narcotics. Recent official state statistics in scientific tests strongly discredit these unsupported arguments that use of marijuana leads to addiction to so-called "hard" narcotics.

These statistics are to be found in Bureau of Criminal Statistics, *Drug Arrests and Dispositions, 1964*, at 10, and L. Goodman and A. Gilman, *The Pharmacological Basis of Therapeutics* (3rd Ed. 1965) 300.

Clausen, in "Social and Psychological Factors in Narcotics Addition" 22 Law and Contemp. Prob. 34, 43 (1957) puts forth the more logical view that addiction to narcotics is based on the user's own psychological structure and his environment rather than on the fact that he might have once used marijuana.

The final myth relates to the harmful effects of marijuana upon the user. The immediate effects of the drug are the most dramatic, and a leading medical authority on the subject of drugs describes them as follows:

> "Marijuana is taken for euphoria, reduction of fatigue, and relief of tension. . . . Small to moderate doses also increase appetite, distort the time sense, increase self-confidence, and like alcohol, can relax some inhibitions."
>
> Fort, "Social and Legal Response to Pleasure Giving Drugs" in the Utopiates, Bloom Ed., 1964, 213-214.

These effects are only temporary and the LaGuardia Report, *supra*, at pages 233-360 failed to find any

direct effect on the organs of the body aside from the temporary psychological experience described above. This view was shared by Dr. Fort, *supra* at 213-214.

While the courts may speculate on the medical and sociological effects of marijuana, there does remain the fact that possession of marijuana can be a felony in California, and this statute should be considered in light of those facts presently available.

As stated in a recent legal article on the problem:

> "Serious questions as to the legislative judgment arise when the abusive drinker faces few and minor penalties and a cigarette smoker is prompted and cajoled to incur the risk of fatal or incapacitating disease, while, in contrast, onerous reprisals await the marijuana smoker merely for privately using or having possession or control of the drug." (*Boyko & Rotberg, supra,* at 781.)

Petitioner respectfully submits that inconclusive facts, ignorance and fear of the effect of marijuana are not proper bases for making possession or sale of marijuana criminal, and certainly not for making the possessor or seller of marijuana face the possibility of a felony conviction.

The Right of Privacy Bars Enforcement of an Unjustifiably Pervasive Criminal Statute.

The doctrine of privacy as a substantive bar to the enforcement of a criminal statute was first recognized in the United States Supreme Court case of *Griswald v. Connecticut*, 381 U.S. 479 (1965). The U. S. Supreme Court in this case overturned the Connecticut statute making it a criminal offense to use birth control devices for the purposes of preventing contraception.

While, the basis for the Court's decision in *Griswald* was the right of privacy, the right of privacy relied on was not the procedural right which affords protection from unreasonable searches and seizures nor the right of privacy found in the Law of Torts, invasion of which leads to money damages. The right and privacy in *Griswald* is a newly recognized one which constitutes "a direct bar to any statute in question." (P. 485.) It was held in that case that the statute infringed on a "zone of privacy which a married couple possessed."

The Court found support for this right of privacy by looking to the "specific guarantees in the Bill of Rights having penumbras, formed by emanations from those guarantees that help give them life and substance. (P. 484.)

This Court further held that various guarantees create zones of privacy, such as the right of association named in the First Amendment; the Third and Fourth Amendments were also specifically mentioned. And, possibly most importantly, this Court held that "the Ninth Amendment providing the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." (P. 484.)

This Court went on to reinforce its argument that penumbral zones of privacy exist by showing that past decisions had found fundamental constitutional rights not specifically mentioned in the Constitution. (Pp. 482-483) and the Court further indicated that rights such as freedom on inquiry, freedom of thought and freedom to teach were such peripheral rights (p. 482.)

These peripheral rights, this Court concluded were essential because without them the specific rights guaranteed by the constitution would be less secure.

Thus, petitioner submitted that just as a zone of marital privacy exists as found in *Griswald, supra*, there is a zone of mental, or sensory, privacy which Sections 11530 and 11531 of the California Health and Safety Code unconstitutionally invade.

> "Just as the individual may express himself graphically, e.g., In *re Klor;* 64 Cal. 2d 816, 415 P. 2d 791, 51 Cal.Reptr. 903, verbally, e.g., *Saia v. New York,* 334 U.S. 558 (1948), *Wollam v. City of Palm Springs,* 59 Cal. 2d 276, 379 P. 2d 481, 29 Cal.Rptr. 1 (1963) and physically, e.g., *DeJonge v. Oregon,* 299 U.S. 353 (1937) in certainly legally protected ways, it can be argued that the individual has a zone of privacy in which he can express himself mentally through the use of marijuana. . . . It may be for spiritual purposes as was the case in *People v. Woody,* supra or for the mere enjoyment of the experience."
>
> *Towne, supra,* at 770.

Thus, *Griswald* clearly establishes that a zone of privacy exists with respect to conduct essential to free expression. Since expression dealing solely with the mind is the most private form of expression possible, possession of marijuana as a necessary incident to its use is conduct which falls within the zone of privacy existing in the First Amendment. It is further submitted that the right to sell marijuana, which is a neces-

sary incident to its acquisition, possession and use, should therefore also be brought within the same zone of privacy.

Sections 11530 and 11531 of the California Health and Safety Code Unconstitutionally Infringe on Unnamed but Fundamental Rights Guaranteed Under the Bill of Rights.

The proposition established in *Griswald* as to broad and unnamed peripheral rights has been affirmed in two recent California cases: *People v. KLOR,* 64 Cal. 2d 816, 820, 415 P. 2d 791, 794; 51 Cal. Rptr. 903, 906, and in *Finot v. Pasadena City Board of Education,* 250 Cal. App. 2d 226, 235, 58 Cal. Rptr. 520, 527. In the *Finot* case, the Court found protected personal rights as in *Griswald.*

In *Finot,* the California Court of Appeal held that a high school teacher could wear a beard without facing the threat of losing his teaching position. That Court found the right to wear a beard came within the right of free expression.

Since it would clearly appear that the right to use and have marijuana is one of the peripheral rights, under *Griswald,* then it must follow that possession is conduct essential to its use, and, further, that sale should also be such a right, since the means of obtaining it are as essential to possession as they are to use.

Sections 11530 and 11531 of the Health and Safety Code Violate the Constitutional Prohibition Against Cruel and Unusual Punishment in That the Punishment Decreed Therein Is All Out of Proportion to Any Alleged Offense Involved.

As discussed above, there are strong protests being raised as to the unjust severity of the marijuana possession laws.

Petitioner submits that the California possession statute violates the constitutional guarantees against cruel and unusual punishment found in the Eighth Amendment to the U.S. Constitution.

This argument is based on the grounds that possession of marijuana and its sale are not conduct within the legislative power to punish as a felony.

Under the ruling of the U.S. Supreme Court in *Robinson v. California*, 370 U.S. 660 (1962), it is the discrepancy between the conduct and the punishment which makes the punishment cruel and unusual. Justice Douglas in a concurring opinion, at p. 676, said "A punishment all out of proportion to the offense may bring it within the ban on cruel and unusual punishments."

See also *Driver v. Hinant*, 356 F. 2d 761, and *Easter v. District of Columbia*, 361 F. 2d 50, where drunkenness prosecutions of alcoholics under local statutes were held to constitute cruel and unusual punishments.

Petitioner submits that by making possession of marijuana possibly a felony, thus equating such conduct with the whole spectrum of common law felonies such as rape, arson, larceny, murder, the statutes are imposing cruel and unusual punishment.

The Classification of Marijuana as a Narcotic in Section 11001 and the Prohibition of Its Possession in Section 11530 of the California Health and Safety Code Violate the Equal Protection Clause of the Fourteenth Amendment.

In order to satisfy the legal protection guarantee, a statute must "cover all persons who are logically, scientifically or by dint of common sense includable in order to effectuate the legitimate goals of the statute." (*Boyko & Rotberg, supra,* at 791.)

Making possession and sale of marijuana illegal while excluding other euphorics such as alcohol, the petitioner submits, is a violation of the guarantee of equal protection. It would appear to be totally erroneous to classify one euphoric, marijuana, as a narcotic, and thus subject to regulation, and to classify another euphoric, *i.e.*, alcohol, as not a narcotic.

Possession of Marijuana Is Protected as a Fundamental Liberty Within the Due Process Clause of the Fourteeth Amendment.

This Court, in *Kent v. Dulles,* 357 U.S. 116 (1958), stated that "travel may be as close to the heart of the individual as what he *eats* or wears or reads." (Emphasis added.)

Just as it was held in the case of *Finot, supra,* that an individual has a right to wear a beard which could not be denied him in the absence of compelling interest on the part of the State, the use of marijuana by one who smokes or ingests it, is, we submit, by similar reasoning within the scope of the personal liberties of the due process clause of the Fourteenth Amendment. Petitioner further submits that the sale of the item

to the person, possession of which is constitutionally protected, should similarly be protected.

By Creating an Exception to the Peyote Possession Statute in People v. Woody, supra, Where Use of Peyote Is a Means of Religious Expression, the California Courts May Be Enforcing, Indeed Initiating an Invidious Form of Religious Discrimination, When at the Same Time the Statute Prohibits Other Hallucinatory or Euphoric Drugs by Individuals.

In *Woody, supra,* an exception is carved out to the "possession statutes" on the grounds that here peyote was being used as a form of religious expression. Since the use of Peyote incorporates the essence of religious expression (*Woody, supra*), and since it is widely held that religious feeling and expression is not restricted solely to members of organized religious groups (John Dewey, a Common Faith, Passim), and since it is recognized that intellectual expression may itself be religious in its outlook, then it follows that the use of marijuana may well incorporate the essence of nonformalized religious expression.

Justice Tobriner goes on to state in *Woody* that the use of peyote presents only slight danger to the State and to the enforcement of its laws. This conclusion, it is submitted, is equally as applicable to the use of marijuana as it is to the use of peyote.

VIII.

THE INCOMPETENCE AND LACK OF DILIGENCE OF PETITIONER'S TRIAL COUNSEL LED TO A DENIAL OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE AID OF COUNSEL.

In a landmark division in *People v. Ibarra,* 60 Cal. 2d 460, 34 Cal. Rptr. at 863, 386 P. 2d 487, it was held that

> "it is a counsel's duty to investigate carefully all defenses of fact and of law that may be available to the defendant, and, if his failure to do so results in withdrawing a crucial defense from the case, defendant has not had the assistance to which he is entitled."

In the present case, trial counsel is clearly responsible for a failure to investigate and present all defenses, because there is a clear defense of entrapment involved. This failure to investigate led to a withdrawal of the defense of entrapment and denied defendant of the representation to which he is entitled.

While the submission of the case on a preliminary transcript alone may not be sufficient evidence of negligence and incompetence, when it is taken together with the failure of researching the case properly and the subsequent failure to raise vital issues in the defense, they do indicate strongly such lack of representation and incompetence as to make the trial of this defendant a mere sham. In *People v. Pineda,* 253 Cal. App. 2d 413, 62 Cal. Rptr. 144, the Court makes a distinction between mere misjudgment of strategy as opposed to actual lack of competent research and investigation so that a real defense is lost.

Of particular importance here is trial counsel's neglecting the defense of entrapment, which was available, and the failure to attempt to locate the paid informer Marks, whose location was known to the prosecution. Petitioner had submitted to his trial counsel all facts known to petitioner, and which facts led to an inescapable conclusion of entrapment; trial counsel was under a duty to investigate these facts. He did not.

Petitioner points with particularity to the very recent case of *People v. Wheeler*, 260 A.C.A. 540, where a conviction was had after submission of the case on the transcript of the preliminary hearing and where defense counsel had called no witnesses, where the record indicated possible avenues of defense, and where the record indicated that the defense counsel was ineffective in other respects.

This counsel has attempted to raise these points in the California appellate courts, and has been denied any consideration because these facts were not in the record. However, it is not right to penalize this petitioner because he did not raise the issue of incompetent counsel at trial, because he was not in a position to decide for himself whether his counsel was, in truth, incompetent. As indicated in *Ibarra, supra*, the defendant is not usually aware of the possible incompetency of his counsel until the trial is at an end and until a third party points out the obvious deficiencies of the representation.

Since trial counsel at all times has charge, and must be the one in charge of the defense (*In re Atchley*, 48 Cal. 2d 408, 310 P. 2d 15; and *People v. Logan*, 137 Cal. App. 2d 331, 290 P. 2d 11) one cannot see how a petitioner such as herein can determine until

after the trial whether the representation was competent. To do otherwise would be to impute to a non-lawyer a knowledge of the law that common sense and experience indicates is not justified.

There is attached hereto as Appendix A, a copy of a declaration made by a trained independent investigator, stating the results of a call made by him on trial counsel. It is submitted that this declaration clearly establishes that petitioner did not receive "effective aid in the preparation and trial of the case." (*People v. Pineda, supra.*)

There is also attached as Appendix A copies of a declaration of counsel in the California Court of Appeals, indicating that there was a valid defense, and asking that it be considered. The denial of this request by that Court would appear to be contrary to the spirit of *Wheeler, supra*, and the other cases on lack of defense. In none of these cases could the adequate defense have appeared at the trial level.

Wherefore, petitioner prays that this Honorable Court issue its writ of certiorari and thereafter review the record, and permit such other and further relief as to this Court seems proper and just in the premises.

Respectfully submitted.

LUKE MCKISSACK,
Attorney for Petitioner.

FRANKLIN BELL GASSMAN,
Of Counsel.

APPENDIX A.

Declaration of Franklin Bell Gassman.

In the District Court of Appeal for the Second Appellate District, State of California.

The People of the State of California, Plaintiff and Respondent, v. Joe Perkins, Defendant and Appellant. No. 16429.

I declare that my name is FRANKLIN BELL GASSMAN, and I am an attorney duly licensed to practice Law in the State of California.

In the latter part of November, 1963, at the request of the family of JOE PERKINS, I visited JOE PERKINS at what I believe is called Wayside Honor Rancho, and at that interview, Mr. Perkins stated that he had been represented by Mr. Clay Jacke, attorney at law, in a criminal matter basically involving the sale of marijuana.

The prisoner stated to me that Mr. Jacke had informed him that he would receive a misdemeanor sentence when in fact he received a statutory sentence.

He further stated that this was his first offense, and that an unfavorable probation report had been submitted; that his attorney, Clay Jacke had stated to him that he would cross-examine the probation officer and the investigating officer on the report, however, in fact, this attorney had not cross-examined either of these witnesses.

Mr. Perkins further related the facts of the case which indicated to me that he had a valid defense to the charge based on entrapment, and Mr. Perkins made further statements to me which indicated that the sentence imposed upon him in this case was inappropriate due to both the nature of the offense, his legal representation, and considerations of the defendant, Mr. Joseph Perkins.

I declare under penalty of perjury this 27th day of May, 1969, at Los Angeles, California, that the foregoing is true and correct to the best of my knowledge.

/s/ Franklin Bell Gassman
Franklin Bell Gassman

Declaration of Albert Von Haenel.

I, Albert Von Haenel, do declare as follows:

That I am a private investigator, licensed by and bonded to the State of California pursuant to Chapter 11 of the Business and Professions Code.

That on or about December 20, 1968, at the instance and instruction of Franklin Bell Gassman, Attorney at Law, I personally contacted Mr. H. Clay Jacke, Attorney at Law, at his office, 3300 West Venice Boulevard, Los Angeles, California, for the purposes of obtaining Mr. Jacke's signature on a Substitution of Attorneys, which substituted Mr. Franklin Bell Gassman in place of Mr. H. Clay Jacke, in the matter of the People of the State of California v. Joe Perkins. I was also instructed to review and obtain, if possible, Mr. Jacke's file in the matter.

At approximately 7:00 p.m. on the above date I was admitted to the offices of Mr. Jacke.

Mr. Jacke stated to me that he had been handling the said case for an associate, Mr. Roy L. Crowell, Attorney at Law. Mr. Jacke further stated that although he did not have the file in his immediate possession, he was thoroughly familiar with the case.

Mr. Jacke stated that when Mr. Perkins was arrested, the police found him with six kilos of heroin in his possession.

Mr. Jacks further stated that he had arranged to have the matter placed before Judge Spencer, but that Judge Spencer had died before the matter could be heard.

Mr. Jacke stated that when the matter was transferred to Judge Munnell, that he had been advised

during a conversation with the Clerk of the Court, that it looked like the police had his client nailed to the wall. Mr. Jacks further stated that he was advised by the Clerk that if he didn't put up much of a fight, that the Court would probably give his client a minimum sentence.

Mr. Jacke further stated that he had deliberately, on numerous occasions, been late or absent from Court proceedings in an effort to delay these proceedings, and had been censored by the judge for this conduct.

Mr. Jacke stated that he had realized the futility of attempting to fight the case for the defendant, and that he had convinced the defendant to submit on the record of the preliminary hearing.

Mr. Jacke further stated that it was quite possible that Mr. Perkins could have believed that an arrangement had been made with the district attorney for a lesser sentence on a submission, however he had made no such arrangement.

Mr. Jacke stated that he believed the sentence to be equitable under the circumstances, since this matter was one involving the sale of hard narcotics.

Mr. Jacke stated that the fee for this case was $2,000.00.

At the time that the above statements were made by Mr. Jacke, he did not have the Perkins file or any notes before him to which to refer.

I, ALBERT VON HAENEL, certify under penalty of perjury, this 27th day of May, 1969, that the foregoing is true and correct to the best of my knowledge, at Los Angeles, California.

/s/ Albert Von Haenel
Albert Von Haenel

APPENDIX B.

First, Third Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States.

Amendment 1.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

RESEARCH REFERENCE: See Am Jur 2d, CONSTITUTIONAL LAW.

Amendment 3.

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

RESEARCH REFERENCE: See Am Jur 2d, MILITARY AND CIVIL DEFENSE.

Amendment 4.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

RESEARCH REFERENCE: See Am Jur 2d, SEARCHERS AND SEIZURES.

Amendment 5.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 9.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

RESEARCH REFERENCE: See Am Jur 2d, CONSTITUTIONAL LAW.

Amendment 14.

(Adopted July 28, 1868)

SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Cross Reference: Deprivation of due process by Federal government, see Amendments, Art. V.

RESEARCH REFERENCE: See Am Jur 2d, CONSTITUTIONAL LAW; CRIMINAL LAW.

SECTION 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

RESEARCH REFERENCE: See Am Jur 2d, ELECTIONS.

SECTION 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss of emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.